NO. 22513

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN B. MEDVED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U. S. Attorney

Room 1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2413

Attorneys for Appellee
United States of America

NO. 22513

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN B. MEDVED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U. S. Attorney

Room 1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2413

Attorneys for Appellee
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

N O. 2 2 5 1 3

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN B. MEDVED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On February 1, 1967, appellant was indicted in one count by the Federal Grand Jury for the Central District of California for concealment of assets from a trustee in bankruptcy in violation of Title 18, United States Code, §152 [C. T. 2]. 1/ Following a trial by jury before the Honorable Irving Hill, United States District Judge, from August 29, 1967 to September 1, 1967, appellant was found guilty.

Appellant was convicted and sentenced, on September 25, 1967, to the custody of the Attorney General for a period of

---

1/ "C. T. " refers to Clerk's Transcript.

two years, and on the condition that six months be served, the remainder of the sentence was suspended and the appellant placed on two years probation [C. T. 59].

Medved filed, on September 29, 1967, a timely Notice of Appeal [C. T. 64].

The District Court had jurisdiction under the provisions of Title 18, United States Code, §§152 and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, §§1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, §152, provides in pertinent part:

> "Whoever knowingly and fraudulently conceals from the . . . trustee . . . in any bankruptcy proceeding, any property belonging to the estate of a bankrupt . . .
>
> "Shall be fined not more than $5,000, or imprisoned not more than five years, or both."

III

QUESTIONS PRESENTED

A. Whether statements of Medved should have been admitted into evidence under Kohatsu v. United States.

B. Whether the trial court erred in not giving two instructions.

IV

STATEMENT OF FACTS

On August 24, 1964, Medved filed his schedules in bankruptcy in the Central District of California, and showed "Cash on Hand" - "NONE" [R.T. 161, 163-64]. 2/ Appearing in the schedule of assets and liabilities is the usual oath that the schedules contain all property [Ex. 1, 165-167]. Outside of a cause of action, the trustee eventually received only a sales tax bond refund of $4.39 [R.T. 168].

On August 7, 1964, Medved went to the Palm Springs National Bank, presented 82 checks [R.T. 265] and in return received $1,254.84 in cash, and a cashier's check in the amount of $3,000 [R.T. 205, Exhibits 3 and 5]. The $3,000 cashier's check was negotiated by Medved on August 14, 1964 for a $2,000 cashier's check [Ex. 19] and $1,000 in cash [R.T. 200-01]. The $2,000 cashier's check was negotiated by Medved on August 24, 1964, (the date of filing for bankruptcy) for a $1,000 cashier's check [Ex. 20] and $1,000 in cash [R.T. 202-93]. The $1,000 cashier's check was cashed by Medved on September 8, 1964 [R.T. 203]. The various cashier's checks were kept at the bank

---

2/ "R.T." refers to Reporter's Transcript.

until the underlying checks had cleared [R. T. 255-57]. When Medved originally presented the 82 checks for encashment he said he did not want to open an account under his name because "He was afraid there would be attachments against the funds" [R. T. 265]. The checks themselves were dated from July 20, 1964 to August 7, 1964 [R. T. 280].

On August 7, 1964, Verna Stearns gave Medved a $1,300 check for the remaining inventory of his nursery, but when she tried to stop payment within fifteen to thirty minutes, the check had already been cashed by Medved [R. T. 362, 365-66, 372, 374].

From approximately July 10, 1964, until the close of business, Medved was selling his nursery stock for less than 1/6 retail at other places [R. T. 292]; gave no receipts [R. T. 298, 314-15, 326]; preferred cash [R. T. 314]; was not told to hold the checks [R. T. 327, 341]; and was selling at less than wholesale [R. T. 340, 371].

Medved was described by a local banker as being "pretty astute" in his business dealings, as "a pretty shrewd businessman" [R. T. 386-87], and as displaying no difficulty in reading [R. T. 388].

On May 18, 1965, J. Clayton Taylor of the FBI, interviewed Medved, along with his wife Margaret [R. T. 421]. Prior to that time Taylor had found 75 checks cashed by Medved at the Palm Springs National Bank made out to cash, Steve Medved and Steve's Nursery [R. T. 84]. For the most part the books of the business did not reflect the sale [R. T. 84]. At that time

Taylor had no information as to whether the monies received by Medved had been spent prior to the filing of the schedules [R. T. 86-87]. At the hearing on the motions to suppress, the defense stipulated that the advice of constitutional rights stated in the FBI reports was made [R. T. 91]. Admittedly, Taylor did not advise Medved that he could have an appointed attorney present at the interview, but in any event, Medved was able to obtain retained counsel, as shown by his representation at trial.

At the interview of May 15, 1965, Medved said he closed the doors of the business on July 23 or 24, 1964, and the only sale in August was of some stepping stones [R. T. 423-24]. Medved said there was no inventory when the doors were closed on July 23 or 24 [R. T. 424]. Medved said he had no cash on hand when he went into bankruptcy [R. T. 426, 429], had made no trips, did no gambling, paid no large bills, and made no gifts during the period [R. T. 428]. At the interview Medved made no mention of the sale to Stearns or the checks cashed at the Palm Springs National Bank [R. T. 433].

Medved was again interviewed on November 1, 1965, and was informed of the location by Taylor of the checks cashed at the bank on August 7, 1964 [R. T. 434]. When asked what happened to the proceeds Medved said, "I don't know" [R. T. 434]. The same response was made to the question of why the proceeds weren't listed on the bankruptcy schedules [R. T. 434]; but he did say he didn't know they had to be listed [R. T. 434-35]. At the earlier interview he said he had no cash when the schedules were

filed [R. T. 437]; and everything was listed [R. T. 438]. At that earlier interview Medved stated -- "His statement to me was that he had nothing. His furniture had been repossessed. All he had was those items he moved, the Cadillac, the trailer, the tractor, and I believe he said a wheelbarrow and garden tools." [R. T. 438.]

At the trial Medved testified in his own defense. He stated he did not intend to cheat the trustee [R. T. 477], but he did have money when he went into bankruptcy [R. T. 494]. He said he lied to the FBI because he was afraid [R. T. 495, 500]. He said he relied on his wife and bookkeeper "for any kind of guidance" in legal and business problems [R. T. 505] (But see, R. T. 568, 569, 572, 584, relative to their degree of participation in his business affairs).

Medved testified he did not know he had to list his money, and the attorney, James Hollowell, did not tell him cash had to be listed or ask him if he had any cash [R. T. 510, 512, 513].

Medved testified that he had kept his own books in the past when he operated two bars in Ohio [R. T. 514-15].

On cross examination, Medved testified that he started dealing in cash because he didn't want his creditors to get the money [R. T. 518], even though he knew his creditors would get his assets through bankruptcy [R. T. 521]. The money was hidden so the creditors couldn't get it [R. T. 524].

Even though the checks cashed on August 7, 1964, were from the business [R. T. 530], Medved did not think it was "all

right to hide that $4,200 from [his] creditors . . . " [R. T. 534.]

After the Medveds testified as to their ignorance of their obligations, James M. Hollowell, a member of the bar of the States of California and North Carolina, and the attorney under whose direction the schedules in bankruptcy were prepared and filed, testified [R. T. 605]. Hollowell specifically explained bankruptcy to both Medveds [R. T. 607, 608]. Both Medveds told him there was only enough cash to pay Hollowell's fees, the filing fees, and another $100 [R. T. 609]. Hollowell specifically told both Medveds that cash had to be listed along with all other assets [R. T. 610-11]. He did not tell them that they could keep cash for living expenses [R. T. 611]. Hollowell went over each blank in the schedules with both Medveds and specifically asked them about each category [R. T. 613-14].

Even though Medved had testified that he didn't know what was on the schedules, Hollowell's secretary, Mary Dracsko, testified that she had a specific recollection of Steven Medved giving the answers which appear on the schedules (Ex. 1) [R. T. 643].

V

ARGUMENT

A. KOHATSU V. UNITED STATES ALLOWS THE ADMISSION OF THE SUBJECT STATEMENTS

Appellant relies on Turzynski v. United States, 268 F. Supp. 847 (N. D. Ill. 1967), for the proposition that a full Miranda warning is needed in the instant case for the admission of Medved's statements of May 18 and November 1, 1965. Turzynski is clearly not the law of this Circuit.

In the instant case Taylor appeared, identified himself, stated the purpose of his call, and advised Medved of his rights, without reference to a free attorney or the right to have one present during the interview. It is clear that Taylor was trying to determine if a crime had been committed.

It is noted that the defense conceded voluntariness in the instant proceedings [R. T. 140]. It is also noted that this trial court found that the case had not reached the accusatory stage at the time of the interviews [R. T. 139].

Kohatsu v. United States, 351 F. 2d 898 (9th Cir. 1965), cert. den. 384 U. S. 1011, reh. den. 385 U. S. 891, states the law of this Circuit, if not the law of the various circuits. For the same reasons stated therein, the instant interviews are admissible. It is noted that Kohatsu has been followed with very few exceptions, namely, Turzynski and two or three other cases. The following well-reasoned cases are illustrative of the fact that

Kohatsu is the law. United States v. Squeri, 398 F. 2d 785, 790 (2nd Cir. 1968); White v. United States, 395 F. 2d 170, 173 (8th Cir. 1968); Feichtmeir v. United States, 389 F. 2d 498, 504 (9th Cir. 1968); Rickey v. United States, 360 F. 2d 32 (9th Cir. 1966), cert. denied 385 U.S. 835. It is also noted that the Ninth Circuit has previously considered Turzynski in Whitfield v. United States, 383 F. 2d 142 (9th Cir. 1967) and paid it little heed.

B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY

1. Appellant's instruction on turning over assets is not the law and should not have been given.

Appellant submitted an instruction relative to "turning the assets over to the trustee" and "knowledge of an obligation to turn over all of his assets to the trustee." He urges that failure to so do was prejudicial to his defense, relying on Strauss v. United States, 376 F. 2d 416 (5th Cir. 1967), and Salley v. United States, 253 F. 2d 897 (D. C. Cir. 1965), neither of which apply to bankruptcy or the offered instruction. The cases relied upon by Medved state that the trial judge has the duty of determining first of all, whether such "theory" is a defense. Here, such is not the case. The relevant defendant's duty was to list his assets, not turn them over. A failure to list is concealment within the statute. United States v. Young,

339 F. 2d 1003 (7th Cir. 1964); Caghlan v. United States, 147 F. 2d 233 (8th Cir. 1945), cert. den. 325 U. S. 888, reh. den. 326 U. S. 805.

While the proposed instruction may have been a theory, it was not a defense. Knowledge of an obligation to turn over assets is simply not relevant to the instant charge.

2. The trial court properly instructed on reasonable doubt.

The Court's instruction on reasonable doubt appears at pp. 735-36 of the Reporter's Transcript, and states, in part:

> " . . . Evidence, in order to convince you beyond a reasonable doubt of a defendant's guilt must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs . . . "

Appellant offered the following instruction instead:

> " . . . It (a reasonable doubt) must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his life. "

While the proper definitions and explanations are elusive, appellant cites McGill v. United States, 348 F. 2d 791 (D. C. Cir. 1965) and its observation that sometimes people act under pressure in their important affairs, and a definition of the doubt is better than a definition of the conviction needed for conviction.

It is noted that the instruction given refers to a "willing" decision while the offered instruction refers to a causal hesitation. In McGill, the Court said both "causal hesitation" and "willing conviction" instructions together are confusing, but nevertheless refused to reverse the conviction. In Jones v. United States, 338 F. 2d 553 (D. C. Cir. 1964) the Court said "We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act," at 555.

In the instruction given herein, the definition is of "evidence" and not "an abiding conviction of . . . guilt", as in Jones, or of "doubt." Judge Hill did not speak of the kind of doubt under which one operates but the kind of proof.

The problem, as conceived in the D. C. Circuit, is with the situation where one acts under doubt and pressure, whereas the instruction given by Judge Hill states that there must be a willingness. The willingness of Judge Hill's instruction negates the coercion of the D. C. Circuit.

In any event, while the instruction given here is different than those given in Jones and McGill, even those used in Jones and McGill did not result in reversals. The question here is whether there has been any prejudice as a result of the instruction given. It is submitted that there has been none, and the instant issue is a furor without a problem. Perhaps the language of McGill, at 797, is appropriate:

" . . . The standard of mental convincement

of a jury may only be approached with words groping to express what is nearly indefinable. Some day perhaps the relevant concepts may be given a quantitative reference, perhaps in terms of probability but meanwhile, we must communicate with words, limited though they may be, for the judge to impress upon a jury the awesome task that is theirs." (Footnotes omitted)

Certainly the statement to Judge Hill that his intended instruction had been held to be error was not, and is not, the case.

VI

CONCLUSION

For the above-stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U. S. Attorney

Attorneys for Appellee
United States of America